

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
CENTRAL TEXAS COMMUNICATIONS, INC. )  
 )  
Petition for Waiver of the FCC's Rules Regarding )  
Transition of Broadband Radio Service and )  
Educational Broadband Service to the Revised )  
Band Plan )  
 )  
COLEMAN COUNTY BROADCASTING, INC. )  
 )  
Application for Review )  
 )

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 1, 2010**

**Released: June 4, 2010**

By the Commission:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we afford Coleman County Broadcasting (CCB) the opportunity to file with the Wireless Telecommunications Bureau (WTB) a petition for waiver to opt out of the transition to the new BRS/EBS band plan. We thus grant in part CCB's application for review<sup>1</sup> of the Bureau's decision<sup>2</sup> granting the petition of Central Texas Communications, Inc. (CTC) for an opt-out waiver but declining to extend a similar waiver to CCB.

**II. BACKGROUND**

2. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transformed the rules and policies governing the licensing of services in the 2500-2690 MHz band.<sup>3</sup> Prior to the *BRS/EBS R&O*, the technical rules and band plan for the 2500-2690 MHz band were designed primarily to promote wireless cable and educational television services, which resulted in licensees receiving interleaved channel groups instead of contiguous channel blocks.<sup>4</sup> In most areas of the country, however, the deployment of wireless cable was not successful.

<sup>1</sup> Application for Review, Coleman County Broadcasting, Inc. (filed May 14, 2009) (AFR).

<sup>2</sup> Central Texas Communications, Inc., *Memorandum Opinion and Order*, 24 FCC Rcd 4715 (WTB 2009) (*MO&O*). See 47 C.F.R. §§ 27.1230-27.1239.

<sup>3</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O*).

<sup>4</sup> In the EBS and BRS services, channels are usually licensed in groups of four. When EBS was created, EBS reception equipment could not receive adjacent channels without interference. Thus, the Commission interleaved the A block channels with the B block channels, the C block channels with the D block channels, the E block  
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3. Consequently, in the *BRS/EBS R&O*, the Commission developed a new band plan and technical rules that permit a range of new and innovative wireless services in the 2500-2690 MHz band and give licensees contiguous channel blocks.<sup>5</sup> The new band plan consists of two low-power segments, the Lower Band Segment (LBS) and the Upper Band Segment (UBS), and a high-power segment, the Middle Band Segment (MBS).<sup>6</sup> The channel configuration and the technical rules for the LBS and UBS are designed to permit a range of wireless services.<sup>7</sup> The MBS, in contrast, consists of seven high-power channels and is designed for the transmission of video programming, for those licensees that still wish to provide such programming.<sup>8</sup> The *BRS/EBS R&O* further established a plan to transition EBS and BRS licensees from their interleaved channel locations to their new channel locations in the LBS, UBS, or MBS.<sup>9</sup> Not all licensees, however, are required to transition to the new band plan and technical rules. The *BRS/EBS R&O* permitted a limited number of Multichannel Video Programming Distributors (MVPDs) to seek waivers from the Commission to “opt out” of the transition, thus permitting them to continue their high-power, high-site operations throughout the entire 2500-2690 MHz band.<sup>10</sup> The Commission specifically found that it was in the public interest to consider waivers on a case-by-case basis for those operators or their affiliates that meet the definition of a multichannel video programming distributor in Section 522 of the Communications Act of 1934, as amended, and that provide MVPD service to five percent or more of the households within their respective geographic service areas (GSAs).<sup>11</sup> The Commission further found that it was in the public interest to consider waivers for any BRS or EBS licensee that is co-located with any qualified MVPD licensee that elects to opt out.<sup>12</sup> In addition, the Commission specifically found that it was in the public interest to consider waivers for those BRS licensees that have a viable business for high-powered operations, but who need more than seven digitized high-powered MBS channels to deliver their service to their customers.<sup>13</sup>

4. On April 27, 2006, the Commission released the *Third Memorandum Opinion and Order and Second Report and Order (BRS/EBS 3rd MO&O)*, in which it affirmed its decision to consider these waivers on a case-by-case basis.<sup>14</sup> In the *BRS/EBS 3<sup>rd</sup> MO&O*, the Commission held that an MVPD

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channels with the F block channels, and the G block channels with the H block channels. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722, 6744 ¶ 47 (2003) (*NPRM*).

<sup>5</sup> See *BRS/EBS R&O*, 19 FCC Rcd at 14168 ¶ 4.

<sup>6</sup> *Id.* at 14169 ¶ 6.

<sup>7</sup> *Id.* at 14168 ¶ 4.

<sup>8</sup> *Id.* at 14185-14186 ¶ 4.

<sup>9</sup> *Id.* at 14197-14198 ¶ 72.

<sup>10</sup> *Id.* at 14199-14200 ¶ 77.

<sup>11</sup> *Id.* at 14199 ¶ 77. This calculation is made in accordance with the requirements of 47 C.F.R. § 76.905(c).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5645 ¶ 72 (2006) (*BRS/EBS 3rd MO&O*). In the *BRS/EBS 3rd MO&O*, the Commission also granted WATCH TV’s request to opt out of the transition of the 2.5 GHz band in Lima, Ohio. *Id.* at 5650 ¶ 84.

provider that wishes to opt out of the transition must file a waiver request within sixty days after an initiation plan is filed with the Commission, or April 30, 2007, whichever is earlier.<sup>15</sup>

5. CCB, through lease agreements with the Santa Anna, Coleman, and Panther Creek school districts, operates a wireless cable system using leased Educational Broadband Service (EBS) spectrum from a site in Santa Anna, Texas under EBS licenses WLX779, WLX691, and WLX576.<sup>16</sup> CCB's system provides 10 video channels to approximately 300 customers in the Santa Anna area for \$12.00/month.<sup>17</sup> All of the channels are local television stations retransmitted from Abilene, Texas or San Angelo, Texas.<sup>18</sup> CCB claims that it is the only source in the community for receiving local television stations because the community cannot receive local television signals over the air.<sup>19</sup> CCB states that the service loses money and is provided as a community service by CCB's parent.<sup>20</sup> According to CCB, its Santa Anna site is located 34 miles from CTC's transmitter site at Lohn, Texas.<sup>21</sup>

6. On April 11, 2007, CTC filed a request for an opt-out waiver.<sup>22</sup> In commenting upon CTC's waiver request, CCB stated that while it found itself in the same position as CTC, CCB did not serve enough customers with its wireless cable system at Santa Anna, Texas to enable CCB to file its own waiver request pursuant to the Commission's Rules.<sup>23</sup> CCB stated that it and CTC could both operate under the old band plan without causing interference to each other, and both could operate under the new plan without causing interference to each other, but CTC and CCB cannot operate on different spectrum plans without causing interference to each other.<sup>24</sup>

7. On April 17, 2009, the Bureau granted CTC's request.<sup>25</sup> While CTC failed to demonstrate that it satisfied any of the specific bases for waiver established in the *BRS/EBS R&O*,<sup>26</sup> the Bureau found that, considering CTC's request under the general waiver standard contained in Section 1.925 of the Commission's Rules,<sup>27</sup> CTC had shown that, in view of its unusual circumstances, requiring it to transition to the new band plan and technical rules would be inequitable, unduly burdensome, and contrary to the public interest.<sup>28</sup> Accordingly, the Bureau granted CTC's waiver request.<sup>29</sup> With respect to CCB, the Bureau said:

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<sup>15</sup> *Id.* at 5646 ¶ 74.

<sup>16</sup> Comments of Coleman County Broadcasting on Petition for Waiver (filed Jun. 25, 2007) (CCB Comments) at 2 and Exhibit No. 2.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Petition for Waiver, Central Texas Communications, Inc. (filed Apr. 11, 2007).

<sup>23</sup> CCB Comments at 2.

<sup>24</sup> *Id.*

<sup>25</sup> *MO&O*.

<sup>26</sup> *Id.* at 4724 ¶ 18.

<sup>27</sup> 47 C.F.R. § 1.925.

<sup>28</sup> *MO&O*, 24 FCC Rcd at 4724 ¶ 19.

<sup>29</sup> *Id.* at 4728 ¶ 32.

With respect to CCB's request that we grant it a waiver similar to any granted CTC, we note that CCB concedes that it does not meet the FCC's waiver standard. In any event, CCB has clearly failed to meet the deadline established for filing opt-out waiver requests. We emphasize that our decision is not based on the form in which CCB submitted its pleading but on CCB's failure to submit a timely waiver request with the necessary information. Accordingly, we will not grant CCB's request, and CCB must fully participate in the transition process for its BTA.<sup>30</sup>

8. CCB filed its AFR on May 14, 2009.<sup>31</sup> CCB argues that the Bureau did not and cannot explain any relevance that CCB's failure to file a waiver request by the original deadline has to the public interest determination of whether, in light of the Bureau's grant of an opt-out waiver to CTC, CCB should be afforded similar treatment.<sup>32</sup> CCB states that it did not file a waiver request because it did not qualify for one under the standards laid down by the Commission.<sup>33</sup> CCB argues that it could not have known that a party could receive an opt-out waiver even though it did not qualify for a waiver under the Commission's standards for MVPD opt-out waivers.<sup>34</sup> In addition, CCB contends that considerations of administrative efficiency do not justify the Bureau's reliance on CCB's failure to meet the filing deadline as sufficient grounds for denying CCB's request.<sup>35</sup> CCB states that it submitted in its June 2007 filing information that CCB believes is comparable in all material respects to the information submitted by CTC in support of its own waiver request.<sup>36</sup> CCB further notes that both its and CTC's requests were processed and ruled upon in the same order.<sup>37</sup> CCB contends that the "overarching irrationality" of the Bureau's order is that it fails to address how CCB is supposed to fully participate in the transition process for its BTA, while at the same time CTC is supposed to operate on the pre-transition channel plan under its opt-out waiver, without causing mutually destructive interference to each other.<sup>38</sup> CCB urges that the Bureau's order be reversed to the extent that it fails to afford CCB an opt-out waiver comparable to the opt-out waiver granted CTC.<sup>39</sup>

9. In response to CCB, CTC takes no position on the merits of CCB's AFR.<sup>40</sup> However, to the extent that CCB is deemed to be asking that the Commission overturn the waiver relief granted to CTC in the Bureau's order, CTC strongly opposes such a request.<sup>41</sup> In reply, CCB states that it does not seek reversal of the waiver granted to CTC, and that CTC merely seeks comparable treatment by the Commission.<sup>42</sup> CCB states that the systems operated by it and by CTC are "joined at the hip" from a technical standpoint, and must operate on the same band plan in order to avoid mutually destructive

<sup>30</sup> *Id.* at 4727-4728 ¶ 29 (footnote omitted).

<sup>31</sup> AFR.

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.*

<sup>40</sup> Conditional Opposition of Central Texas Communications, Inc. (filed May 29, 2009) (CTC Opposition) at 2.

<sup>41</sup> *Id.*

<sup>42</sup> Reply to Conditional Opposition, Coleman County Broadcasting, Inc. (filed Jun. 10, 2009) (Reply) at 2.

interference.<sup>43</sup> CCB argues that because the Bureau found that granting CTC an opt-out waiver serves the public interest, that same public interest require that CCB continue to operate on its existing band plan as well.<sup>44</sup> CCB notes that CTC's system encompasses the only BRS/EBS stations licensed in the entire Brownwood BTA.<sup>45</sup> CCB further notes that the nearest BRS/EBS stations to CCB's Santa Anna system are in Abilene, and are terrain-shielded from Santa Anna, such that CTC's continued operation on the old band plan would not interfere with their transition to advanced communications services.<sup>46</sup> CCB states that the only adverse result on other BRS or EBS stations – mutually destructive interference – would result from refusing to grant an opt-out waiver to CCB comparable to the waiver granted to CTC.<sup>47</sup>

10. On February 14, 2007, Clearwire Spectrum Holdings, LLC (Clearwire) filed a transition initiation plan for the Abilene BTA.<sup>48</sup> On May 22, 2009, Clearwire withdrew its transition initiation plan for the Abilene BTA.<sup>49</sup> Clearwire withdrew the initiation plan for the Abilene BTA because of issues regarding CCB's desire to opt out of the transition.<sup>50</sup>

### III. DISCUSSION

11. Initially, we agree with the Bureau that it was clear that CCB should have filed a request for an opt-out waiver by April 16, 2007, or sixty days after Clearwire filed its transition initiation plan for the Abilene BTA.<sup>51</sup> Section 27.1231(g) of the Commission's Rules unambiguously states that that an MVPD provider that wishes to opt out of the transition must file a waiver request within sixty days after an initiation plan is filed with the Commission for the BTA in question, or April 30, 2007, whichever is earlier.<sup>52</sup> Furthermore, in specifying factors that would warrant favorable waiver treatment, the Commission did nothing to foreclose a waiver grant to CCB or any other MVPD provider pursuant to our general waiver standard. For this reason, as well as CCB's representation that its only realistic option for continuing service is pursuant to an opt-out waiver grant,<sup>53</sup> we find unconvincing CCB's explanation why

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 3, citing *MO&O*, 24 FCC Rcd at 4728 ¶ 30.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Letter from Terri B. Natoli, V.P. Regulatory Affairs & Public Policy, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Feb. 14, 2007).

<sup>49</sup> Letter from Nadja S. Sodos-Wallace, Senior Regulatory Counsel, Assistant Secretary, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed May 22, 2009).

<sup>50</sup> See Self-Transition Notification, License B003, NSAC, LLC, WT Docket No. 06-136 (filed May 29, 2009) at 1.

<sup>51</sup> Because the 60<sup>th</sup> day after February 14, 2007 is a Sunday, CCB would have had until the following Monday, April 16, 2007, to file its waiver request. See 47 C.F.R. § 1.4(j).

<sup>52</sup> 47 C.F.R. § 27.1231(g).

<sup>53</sup> See CCB Comments on CTC Petition for Waiver at 3 ("If CCB is not permitted to continue providing its service under the old spectrum plan for BRS and EBS, the most likely result is that the service will be discontinued when the Transition is effected. This is so because it would cost CCB a minimum of \$400,000 to convert to a digital system, nearly \$1,500 per subscriber. Incurring such an expense is not practical given the limited revenue potential for the service"). Thus, CCB's implied suggestion that it had no reason to opt out until it knew that CTC requested an opt-out waiver is belied by CCB's representation that financial constraints would force it to cease operations unless it could continue operating under the old spectrum plan. Moreover, once CCB realized that CTC had requested a waiver to continue operating under the old spectrum plan – a request that CTC filed before the April 16, 2007 deadline for CCB to request a waiver – its only responsible course of action would appear to be to file a similar  
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it did not apply for a timely waiver. Section 1.925 of the Rules establishes that the Commission has flexibility in implementing the rules that the Commission adopts pursuant to its authority under the Communications Act.<sup>54</sup> CCB was always free to request such flexibility and seek a waiver under the general waiver standard. We note that several other MVPDs filed timely waiver requests notwithstanding the fact that they did not allege they complied with either of the specific tests enunciated by the Commission.<sup>55</sup> We also disagree with CCB that its comments provided sufficient information to judge whether CCB was entitled to an opt-out waiver. For example, CCB's Comments did not provide information regarding the technical parameters of its operations, and made no attempt to explain which rules needed to be waived in order to allow it to continue operating.

12. Furthermore, we note our concern that CCB's conduct has disrupted the transition process in the Abilene BTA. Clearwire withdrew its transition initiation plan for the Abilene BTA at a very late date, because of concerns over CCB's request to opt out of the transition.<sup>56</sup> Other licensees were required to file self-transition notifications with waiver requests because Clearwire did not withdraw the transition initiation plan for the Abilene BTA until after the April 21, 2009 deadline for self-transitions.<sup>57</sup>

13. Nevertheless, in the instant case, we recognize that failure to afford CCB an opportunity for relief will likely result in the discontinuation of CCB's service once the transition is finally completed.<sup>58</sup> We also note CCB's allegations that it is the only available option for local television service in its community, and that its system is terrain shielded from Abilene,<sup>59</sup> as well as Clearwire's decision to withdraw its transition plan for the Abilene BTA. Under those circumstances, we believe it is appropriate to allow CCB an opportunity to file a properly supported request for waiver. Accordingly, we will, on our own motion, waive Section 27.1231(g) of the Commission's Rules and give CCB 30 days from the release of this *Memorandum Opinion and Order* to file a request for waiver to opt out of the transition. We take this action primarily in order to protect CCB's customers. Affording CCB the opportunity to submit a properly filed waiver request could assist in preserving the availability of local television services in the Abilene BTA and further the Commission's goals of promoting competition, diversity, and localism.<sup>60</sup>

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opt-out waiver request by the deadline, even though it could not know whether the Commission would grant those requests.

<sup>54</sup> See County of Granite, Montana, *Order*, 24 FCC Rcd 5704, 5711 ¶ 17 (PSHSB PD 2009).

<sup>55</sup> See, e.g., Dakota Central Telecommunications Cooperative, *et al.*, *Memorandum Opinion and Order*, 24 FCC Rcd 4729 (WTB 2009) (partially granting request by Dakota Central Telecommunications Cooperative for a permanent waiver to opt out of the transition for its MVPD system in Brush Hill, ND); United Telephone Mutual Aid Corporation, *Memorandum Opinion and Order*, 24 FCC Rcd 4743 (WTB 2009) (granting request by United Telephone Mutual Aid Corporation for a permanent waiver to opt out of the transition for its MVPD systems in Milton and Egeland, North Dakota).

<sup>56</sup> See Letter from Nadja S. Sodos-Wallace, Senior Regulatory Counsel, Assistant Secretary, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed May 22, 2009); Self-Transition Notification, License B003, NSAC, LLC, WT Docket No. 06-136 (filed May 29, 2009) at 1.

<sup>57</sup> See 47 C.F.R. § 27.1236(b)(1).

<sup>58</sup> See CCB Comments at 3.

<sup>59</sup> Reply at 3.

<sup>60</sup> FCC Strategic Plan 2009-2014 at 5. The FCC Strategic Plan, which is required by the Government Performance and Results Act of 1993 (5 U.S.C. § 306), defines the agency's missions, goals and means by which it will measure progress related to its mission. The current FCC Strategic Plan is available at <http://www.fcc.gov/omd/strategicplan/>.

14. CCB's waiver request shall contain a full description of the technical parameters of its system, list the rules it needs waived, and analyze the impact a waiver might have on neighboring licensees. Consistent with prior practice, the Bureau shall issue a public notice seeking comment on CCB's waiver request. The Bureau shall review the waiver request and filed comments and act on the waiver request consistent with Commission and Bureau precedent.<sup>61</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

15. We agree with the Bureau that CCB should have filed a request for waiver to opt out of the transition by April 16, 2007. We conclude, however, that it is in the public interest to waive our rules and give CCB 30 days from the release of this *Memorandum Opinion and Order* to allow CCB to file a request for waiver to opt out of the transition to the new band plan.

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 155 (c), and Sections 1.115 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.115, 1.925, that the Application for Review filed by Coleman County Broadcasting on May 14, 2009 IS GRANTED to the extent indicated above and in all other respects IS DENIED.

17. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925 and 27.1231(g) of the Commission's Rules, 47 C.F.R. §§ 1.925, 27.1231(g), that Section 27.1231(g) of the Commission's Rules IS WAIVED to allow Coleman County Broadcasting to file a request for waiver to opt out of the transition to the new BRS/EBS band plan within 30 days of the release of this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

<sup>61</sup> See, e.g., *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5650 ¶ 84; WHTV Broadcasting Corp. d/b/a Digital TV One and Caribbean University, *Memorandum Opinion and Order*, 22 FCC Rcd 1314 (WTB/2007); Antilles Wireless, L.L.C. d/b/a USA Digital, *Memorandum Opinion and Order*, 22 FCC Rcd 9348 (WTB 2007); *MO&O*.